Supreme Court, U.S.
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No. 00-1728

IN THE

Supreme Court of the United States

RICKY BROWN, *et al.*,

Petitioners,

v.

CITY OF ONEONTA, NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR CITY OF ONEONTA RESPONDENTS

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that the police did not violate the Equal Protection Clause when they used a victim's description of a suspect's race to determine with whom to conduct consensual interviews.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	5
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Federal Cases:

Brinegar v. United States, 373 U.S. 160 (1949) ... 6

Brown v. Board of Education, 347 U.S. 483 (1954) 7

Brown v City of Oneonta, 203 F.3d 153 (2d Cir. 1999), *amended and superceded*, 221 F.3d 329 (2d Cir. 2000) 4

Brown v. Oneonta, 106 F.3d 1125 (2d Cir. 1997) ... 3

Buffkins v. City of Omaha, 922 F.2d 465 (8th Cir. 1990), *cert. denied*, 502 U.S. 898 (1991) 8

Dempsey v. Town of Brighton, 749 F. Supp. 1215 (W.D.N.Y. 1990), *aff'd without op*, 940 F.2d 648 (2d Cir.), *cert. denied*, 502 U.S. 898 (1991) 8

Foster v. California, 394 U.S. 440 (1969) 9

Florida v. Bostick, 501 U.S. 429 (1991) 6, 8

Florida v. Royer, 460 U.S. 491 (1983) 6, 8

I.N.S. v. Delgado, 466 U.S. 210 (1984) 6, 8, 10

Loving v. Virginia, 388 U.S. 1 (1967) 7

Cited Authorities

	Page
McLaughlin v. State of Florida, 379 U.S. 184 (1964)	7
The Munrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959)	12
Terry v. Ohio, 392 U.S. 1 (1968)	6
United States v. Armstrong, 517 U.S. 456 (1996)	7
United States v. Bautista, 684 F.2d 1286 (9th Cir. 1992)	9
United States v. Brignoni-Ponce, 422 U.S. 873 (1975)	9
United States v. Johnston, 268 U.S. 220 (1925)	12
United States v. Manual, 922 F.2d 272 (10th Cir. 1993)	7
United States v. Martinez-Fuerte, 428 U.S. 543 (1976)	10
United States v. Waldon, 206 F.3d 597 (6th Cir. 2000)	8
United States ex rel. Smiley v. LaVallee, 473 F.2d 682 (2d Cir. 1973)	9
Whren v. United States, 517 U.S. 806 (1996)	7
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	7

Cited Authorities

Page

United States Constitution:

Fourth Amendment 1, 3, 6, 10

Federal Statutes:

42 U.S.C. § 1981 4

42 U.S.C. § 1983 4

Other Authorities:

Sheri Johnson, "Race and the Decision to Detain a Suspect", 93 Yale L.J. 214 (1983) 9

Respondent City of Oneonta and its named police officers (the City Respondents), submit this brief in opposition to petitioners' petition for a writ of certiorari. The petition should be denied because it seeks review of an interlocutory, fact-specific decision which is based upon settled legal principles and which is not in conflict with any decision of this Court or with any decision of the circuit courts of appeals.

STATEMENT OF THE CASE

This case involves the utilization by city, county and state law enforcement officials of a victim's description of her attacker as a black male to conduct interviews of persons fitting that description. This lawsuit was commenced by all members of the black community in the City of Oneonta in upstate New York who were interviewed by the police in the criminal investigation which followed the assault. The District Court and the Second Circuit Court of Appeals upheld the Fourth Amendment complaints of five individuals who were detained by the police. However, the Second Circuit dismissed petitioners' class-wide claim that the police's actions in limiting their interviews to blacks in the City of Oneonta violated the Equal Protection Clause, as such conduct did not constitute a prohibited racial classification. Petitioners subsequently filed the instant petition for writ of certiorari.

1. On September 4, 1992, an elderly woman was attacked as she slept in a residence located outside the city limits of the City of Oneonta. The woman had just returned from a lecture at the State University College at Oneonta (SUCO) and was in bed when the attack occurred. The woman, who observed only her attacker's hand and/or

arm, identified her attacker as a black male, and assumed he was young because of his quick movements. During the struggle, she and perpetrator were both cut and bleeding. The attacker fled the residence and the police were called. A police canine tracked the assailant's scent in the direction of the SUCO campus but lost its scent.

The criminal investigation was controlled by the state police, and consisted of interviews of the residents of the house, neighbors and persons at local hospitals and pharmacies to determine if a black male sought treatment for a cut. Students on and off the campuses of Hartwick College and SUCO were interviewed, as well as persons at other locations, including the bus terminal and the Federal Job Corps Center.

The involvement of the named City of Oneonta police officers began and ended on September 4, 1992. Officers Redmond and Olsen were the first to arrive at the scene and speak to the victim. Detective-Sergeant Shedlock and Detective Davis made themselves available to assist the state police during the day of September 4, 1992. Shedlock assisted in obtaining a list of black male students at SUCO. Later on, the state police produced lead sheets, which were distributed to the various law enforcement officials assisting in the investigation.

Detectives Shedlock and Davis went to the SUCO campus and other locations to interview students on the lead sheets. According to the detectives, all of the interviews were voluntary in nature. Shedlock and Davis did some additional interviews at locations off campus during the remainder of the day and before they went off duty at approximately 9:00 p.m. Neither Chief Donadio nor Officers Redmond or Olsen

performed any interviews in connection with this case. The investigation by the state police continued for some time after the participation of the City defendants ceased on September 4, 1992. No person has been arrested for the crime in question.

2. The original complaint was filed in March of 1993; an amended complaint was filed in April of 1993; and a second amended complaint was filed in January, 1995. The Oneonta respondents, along with the other respondents, moved on three separate occasions to dismiss the complaints upon the grounds that they failed to state a cause of action, that the individual respondents were entitled to qualified immunity and that the respondents were entitled to summary judgment. While each of the named Oneonta respondents submitted affidavits detailing their actions and limited participation in the investigation, only six petitioners (Quinones, Cantave, Champen, Brown, Morris and Champen) submitted affidavits in opposition to the motion to dismiss and for summary judgment.

The District Court issued four decisions on the motions, and the Court of Appeals issued two rulings. Initially, the district court granted summary judgement in favor of Oneonta officers Redmond and Olsen. (A-11). Petitioners' claims concerning the production of a list of black students by SUCO were dismissed by the Second Circuit Court of Appeals in 1997. *See Brown v. City of Oneonta*, 106 F.3d 1125 (2d Cir. 1997). The majority of plaintiffs' Fourth Amendment claims were dismissed or discontinued. The only Fourth Amendment claims that presently survive are the claims of Jamel Champen; Jean Cantave; Ricky Brown; and Sheryl Champen. (A-26). The *Monell* claim against the City of Oneonta was also discontinued with prejudice in order to allow the petitioners to immediately appeal the district court's dismissal of their equal protection claims. (A-13).

In its initial decision dated October 26, 1999, the Court of Appeals unanimously affirmed the dismissal of the petitioners' equal protection claims brought under 42 U.S.C. §§ 1981 and 1983. On August 8, 2000, the Court of Appeals issued an amended decision adhering to its prior ruling. The court noted that the petitioners' theory of discrimination presented in the complaint was one of express racial classification, rather than a claim that a neutral law was applied unevenly and with intentional discrimination. (A-15-16). The court stated that the petitioners did not allege that "upon hearing that a violent crime had been committed, the police used an established profile of violent criminals to determine the suspect must have been black." (A-16). The Court affirmed the dismissal of the claim of racial discrimination asserted by petitioners by noting: "The description, which originated not with the state but with the victim, was a legitimate classification within which potential suspects might be found." (A-17).

The decision of the Second Circuit was unanimous. (A-4-27). Petitioners' request for reargument was denied, *Brown v. City of Oneonta*, 203 F.3d 153 (2d Cir. 1999), *amended and superceded*, 221 F.3d 329 (2d Cir. 2000), as was their request for rehearing *en banc*. (A-57).

The District Court was instructed that it could entertain a motion to replead on remand of the case. (A-20 n.9). Following that remand, the petitioners made a motion to amend the complaint so as to adopt the reasoning of Judge Calabresi in his dissent to the decision denying an *en banc* hearing. (Pet. 11). Petitioners sought to allege facts showing that police ignored the victim's description of the assailant by questioning and examining African Americans regardless of age or gender. However, petitioners requested that their motion be held in abeyance pending the outcome of the petition for certiorari.

REASONS FOR DENYING THE WRIT

Petitioners maintain that the use by local police of a victim's description containing the skin color of her attacker is required to be strictly scrutinized under the Equal Protection Clause of the United States Constitution. A three judge panel of the Second Circuit Court of Appeals rejected this claim, noting that because the description of the attacker came from the victim herself, and not from any stereotyping by the police, petitioners' claims of racial profiling or an express racial classification were correctly dismissed. The decision itself is fact-specific; is not in conflict with the precedent of this Court or any other federal circuit; and leaves open the possibility of a repleading on remand of the surviving claims. In short, petitioners cannot demonstrate that any of the traditional reasons for granting certiorari exist, and their claims do not warrant review by this Court.

1. Petitioners declare this case to be one of racial profiling, a phrase used seven times in the first three pages of their argument. (Pet. 12-14). It is not until the 26th page that petitioners acknowledge that ". . . identification cases represent an exception to the general rule that race is an irrelevant and constitutionally impermissible basis for law enforcement action." (Pet. 26). Petitioners' use of the phrase "racial profiling" confuses and fails to reconcile the distinction between police action resulting from descriptions of identity, including skin color, and that which arises from prejudicial stereotyping. Petitioners failed to state an equal protection claim in their complaint because they blurred the clear distinction between impermissible profiling and use of a physical description to pursue investigations.

To a certain degree, both the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment control police-civilian encounters. This Court has adopted a balancing test in applying the Fourth Amendment prohibition against unreasonable seizures, which measures the government's interest in crime protection against the individual's interest in privacy. *Brinegar v. United States*, 338 U.S. 160 (1949). As the intrusiveness of an encounter increases, the Court requires a more specific justification by the police. While a full-fledged arrest must be supported by probable cause, a more limited temporary detention is authorized under a lesser reasonable suspicion standard. *Terry v. Ohio*, 392 U.S. 1, 24-27 (1968). However, not all police encounters implicate the Fourth Amendment. Thus, it has been held that a Fourth Amendment seizure does not occur merely because a police officer approaches an individual and asks that person questions. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Such an encounter, while possibly unpleasant, does not violate in any sense a person's right to privacy. As a practical matter, it is also indispensable for the police to be allowed to pursue all leads, even those based upon hunches and gut feelings, with the limitation that their actions cannot go beyond mere questioning without specific justification. This Court has authorized such consensual questioning even where officers have **no basis** for suspecting a particular individual. *Florida v. Bostick*, 501 U.S. 429 (1991) (allowing suspicionless questioning on buses); *I.N.S. v. Delgado*, 466 U.S. 210 (1984) (in factories); *Florida v. Royer*, 460 U.S. 491 (1983) (and in airports). To require police to voice an articulable suspicion prior to questioning individuals, especially at the earliest and most amorphous stage of an investigation, would require "... overruling a long, unbroken line of decisions dating back more than 20 years ..." *Bostick*, 501 U.S. at 439.

With regard to the Equal Protection Clause, this Court has recognized claims based on selective enforcement where the claimant has demonstrated that the policy in question had a discriminatory effect and was motivated by a discriminatory purpose. *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Where the state creates an improper and stereotypical classification based upon race or other protected characteristics of a disfavored group, this Court has been quick to strike it down. *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that restricting the freedom to marry based upon race violates the central meaning of the Equal Protection Clause); *McLaughlin v. State of Florida*, 379 U.S. 184 (1964) (cohabitation law which only covers interracial couples constitutes impermissible racial classification); *Brown v. Board of Education*, 347 U.S. 483 (1954) (rejecting the state-created premise that blacks and whites should not attend the same school). For the purpose of addressing petitioners' petition, we can assume that the Court would look upon racial profiling or stereotyping with disfavor. *See United States v. Manual*, 922 F.2d 272 (10th Cir. 1993) (holding *in dicta* that if members of a drug interdiction police unit were to seek consensual interviews from only blacks coming from a bus terminal in their search for narcotics, then this conduct may violate the Equal Protection Clause); *Whren v. United States*, 517 U.S. 806, 813 (1996) (acknowledging that if police selectively enforced traffic laws against blacks, such intentional discriminatory conduct would violate the mandate of equal protection). *But see United States v. Armstrong*, 517 U.S. 456, 470 (1996) (holding that district court erred in assuming that all crimes are committed, proportionately, by all races, in light of statistics that show that 90% of the individuals sentenced for crack cocaine were black, and 90% of the individuals convicted for possession of LSD or pornography were white).

However, none of the foregoing Equal Protection or Fourth Amendment concerns are implicated by the present petition. While the generalized description provided by a victim may be insufficient to satisfy either a probable cause or reasonable suspicion standard, police are not prevented from conducting consensual interviews even where they have **no basis** to suspect an individual. *See Bostick*, *supra*; *Delgado*, *supra*; *Royer*, *supra*. It necessarily follows that the police can limit their investigation and their consensual interviews of potential suspects to blacks, where the victim indicates that the suspect is black.

Similarly, the Equal Protection Clause does not prohibit the police from using race as a factor to guide their investigation of a crime where that characteristic matches the description of the perpetrator. In such a circumstance, the use of skin color is constitutional because it is a criterion with its genesis in the actual facts of the crime, and not from racially motivated assumptions made by a state actor. *United States v. Waldon*, 206 F.3d 597, 604 (6th Cir. 2000) ("Common sense dictates that, when determining who to approach as a suspect of a criminal wrongdoing, a police officer may legitimately consider race as a factor if descriptions of the perpetrator given to the officer involve race."); *Buffkins v. City of Omaha*, 922 F.2d 465, 468 (8th Cir. 1990), *cert. denied*, 502 U.S. 898 (1991) (holding that police officer's identification of suspect was reasonable and non-discriminatory in light of the fact that suspect's race matched the racial description of the person identified in the tip); *Dempsey v. Town of Brighton*, 749 F. Supp. 1215, 1224 (W.D.N.Y. 1990), *aff'd without op*, 940 F.2d 648 (2d Cir.), *cert. denied*, 502 U.S. 898 (1991) (where police were aware that robbery suspect was black, holding that it was not discriminatory to concentrate their investigation on that race);

United States v. Bautista, 684 F.2d 1286 (9th Cir. 1992) (holding that race can be a relevant factor for a seizure). As noted by one commentator, the use of race as an identifier does not require strict scrutiny " . . . because suspects in all racial groups will be identified in part by their race, reliance upon the witness' description of the perpetrator's race seems to impose equal burdens on all races." Sheri Johnson, "Race and the Decision to Detain a Suspect," 93 Yale L.J. 214, 242-243 (1983). Indeed, in an analogous situation involving lineups, it has been held impermissible for the police **not** to limit their investigation to a particular race. For example, if the suspect is black, the "fillers" in an in-person or photo lineup must match the suspect's skin color, or the identification procedure will be held to be unduly suggestive. *See Foster v. California*, 394 U.S. 440, 442-443 (1969) (holding that participants in a lineup should have same general physical characteristics); *United States ex rel. Smiley v. LaVallee*, 473 F.2d 682, 683 (2d Cir. 1973) (holding that a lineup was not impermissibly suggestive where the suspect and the five fillers were all black).

The petitioners' reliance on *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), a border search case, is unpersuasive. Petitioners cite that case as authority for the proposition that law enforcement actions based on race and/or national origin are prohibited and, by implication, that police cannot question an individual because of his race or ancestry. (Pet. 20-21). In fact, *Brignoni-Ponce* held that Mexican ancestry **was** a relevant factor police may consider under the circumstances of that case, but that that factor, standing alone, was insufficient to satisfy the reasonable suspicion standard for stopping a moving vehicle. 422 U.S. at 886-887. *Brignoni-Ponce* does not, therefore, invalidate police action which is based on race or ancestry,

particularly where that characteristic is legitimately connected to the crime being investigated. *Accord United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976) (referrals by border agents of vehicles to a secondary inspection area on the basis of Mexican ancestry does not violate the Constitution).

The case of *I.N.S. v. Delgado*, 466 U.S. 210 (1984) is even more to the point. In that case, members of the INS entered work sites and questioned workers to determine if they were illegal aliens. *Id.* at 211-212 (1984). The INS agents were looking for aliens from Mexico working at Southern California factories, and swept through workplaces questioning most of the workers. *Id.* at 212. The selection of the subject was presumably based on physical characteristics of Mexican ancestry. *Id.* at 223-24, 233-34. The Supreme Court rejected the Court of Appeals' ruling that the individuals could not be questioned in the absence of particularized suspicion, and upheld the "factory sweep" under the Fourth Amendment. *Id.* at 219-221. Petitioners' argument in this case is, in effect, an attempt to impose this very same reasonable suspicion standard on consensual interviews. (A-189 "Defendants' law enforcement officials seeking out, approaching, questioning . . . plaintiffs were based, not on any requisite level of suspicion, but solely on plaintiffs' race.").

Alternatively, petitioners argue that when race or national ancestry is used by police, the district court should impose a strict scrutiny test which will likely invalidate the police action. This argument simply defies common sense. Respondents accept that race or national origin, standing alone, does not justify a seizure. Respondents accept that had the police merely assumed the a suspect was of a particular race, acting upon the assumption may constitute

an impermissible classification. However, respondents reject petitioners' argument that utilizing a significant and identifiable physical characteristic provided by the victim to limit the scope of the investigation somehow violates equal protection principles.

The petitioners' challenge of the police investigation in this case is simply misplaced. The complaint does not allege invidiously discriminatory animus by a particular police officer or officers. It does not establish, according to the careful analysis of the District Court, a claim of selective treatment. Petitioners' sole class-based claim, based on a racial classification, was properly rejected by the Second Circuit on the basis that it was not a state-imposed classification at all, but rather was a description by the victim which the police had every right to utilize. When a police officer is provided with credible information that a suspect is black, his conscious decision to concentrate his search on that subsection of the population is neither discriminatory nor unconstitutional.

2. There are additional factors which mitigate against this Court exercising its jurisdiction to review this case. Initially, the present decision is interlocutory in nature. The Second Circuit has acknowledged the possibility of repleading (A-20 n.9), and a motion to amend the complaint has already been filed. It may be that resolution of said motion will avoid the need to decide the present Constitutional claim.

Second, the Circuit Court was clear that this case was to be resolved solely on facts that were particular and unique:

> The plaintiffs have argued that there is little difference between what occurred here and an

> unlawful profiling based on a racial stereotype. While we disagree as a matter of law and believe that the conduct of the police in the circumstances presented here did not constitute a violation of the equal protection rights of the plaintiff, we do not establish any rule that would govern circumstances giving rise to liability that are not present in this case.

(A-20). Fact patterns which are case-specific have traditionally not been reviewed by the Supreme Court. *United States v. Johnston*, 268 U.S. 220, 227 (1925). Moreover, this is not a case of racial profiling or stereotyping. A review of such issues by this Court should await a case where those issues are actually presented by the facts of the case in a concrete and final manner. *The Munrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

Finally, there is no need for this Court to review an interlocutory, fact-specific decision which does not conflict with Supreme Court or other circuit court precedent, and which in fact faithfully follows existing equal protection law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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